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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 612

GREAT NORTHERN RAILWAY COMPANY, APPELLANT

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA

BRIEF FOR THE UNITED STATES

OPINIONS

The opinion of the specially constituted District Court (Circuit Judge Kenyon and District Judges Sanborn and Molyneaux) is reported as *Great Northern Railway* v. *United States,* 22 F. (2d) 865 (R. 110).

The Commission's report appears as *Guaranty Settlement with Great Northern Railway,* 111 I. C. C. 318 (R. 81).

JURISDICTION

The final decree dismissing petition was entered October 1, 1927 (R. 107); and reentered as amended October 20, 1927. (R. 110.) The appeal was allowed on October 21, 1917 (R. 112), under Urgent Deficiencies Act of October 22, 1913 (38 Stat. 219), and Section 238 of the Judicial Code, as amended February 13, 1925 (c. 229, 43 Stat. 938; U. S. C. Title 28, Sec. 47). (R. 2.)

QUESTION

By Section 209 of the Transportation Act of 1920 (not part of Interstate Commerce Act) the United States guarantees to railroads a certain railway operating income for the period of six months immediately following Federal Control on a basis substantially the same as that which they had received during Federal Control. The Interstate Commerce Commission was directed to ascertain and certify to the Secretary of the Treasury the several amounts necessary to make good the guaranty.

The Commission had issued four certificates aggregating $12,500,000 which Great Northern had been paid. On June 8, 1926, the Commission issued its amended certificate (which cancelled a previous certificate) (R. 106; Exhibit C, R. 24), and which recited that final determination had been made and certified the amount necessary to make good to Great Northern as $11,170,214.02. That certificate showed that an overpayment had been previously made to Great Northern of $1,329,785.98.

In order to prevent deductions from compensation earned for the carriage of the mail, Great Northern entered into written agreement (R. 26) with the United States under which it deposited Liberty Bonds aggregating $1,625,000 with the Comptroller General to be held by him pending the final determination of the claim in an action against the United States (R. 26).

The question is, Whether the amended certificate of June 8, 1926, is an *order* within the meaning of Urgent Deficiencies Act and the specially constituted District Court has jurisdiction to cancel it; *to enjoin the use of the certificate for any purpose whatever by the United States or any official thereof* and *to enjoin the United States* from disposing of any of the Liberty Bonds and from refusing to return them to Great Northern. (R. 21.)

STATUTES

Appendix A. Commerce Court Act (c. 309, 36 Stat. 539) and Urgent Deficiencies Act (c. 32, 38 Stat. 219; U. S. C. Title 28, sections 43, 46, 47).

Appendix B. Section 209 of the Transportation Act of 1920 (c. 91, 41 Stat. 464; U. S. C. Title 49, section 77) and amendment of February 26, 1921 (c. 72, 41 Stat. 1145; U. S. C. Title 49, section 79).

STATEMENT

Alleging facts of which the Court takes judicial notice, e. g., on December 31, 1917, the President took possession and assumed control of the rail-

roads and operated them under the Federal Control Act of March 21, 1918, until they were relinquished on March 1, 1920 (R. 2), Great Northern further alleges that on December 30, 1918, it entered into a contract with the Director General for annual compensation under Section 1 of the Federal Control Act, and prior to March 15, 1920 filed with the Commission a written statement that it accepted all the provisions of Section 209 (R. 2).

Great Northern further alleges that on October 18, 1920, the Commission ordered all carriers which had accepted the provisions of Section 209 to file with the Commission true and correct returns to a questionnaire and form of claim accompanying the order which were to be the basis for settlements under Section 209, and on February 11, 1921, Great Northern filed its verified return showing $14,333,-340.54 was one-half of its standard return, and therefore one-half of the annual compensation fixed by its contract under the Federal Control Act, and the amount of increase in such compensation provided for in Section 4 of the Act was $509,217.46. The return further showed Great Northern had an operating deficit during the guaranty period amounting to $3,655,833.67, so the total amount claimed, without the deduction for advances theretofore made, was the sum of $18,498,391.67, making amount due after deduction of advances $11,998,-391.67. (R. 4, 5.)

Great Northern alleges that during the guaranty period it made application to the Commission for

advances which were necessary to enable it to meet fixed charges and operating expenses, and the Commission certified to the Secretary of the Treasury three separate amounts aggregating $6,500,000, which were not "in excess of the *estimated* amount necessary to make good to petitioner the guaranty provided for in Section 209." (R. 3.)

Great Northern further alleges that before receiving any of the payments mentioned it executed, on June 30, 1920, a contract with the Secretary of the Treasury to the effect that upon final determination of the amount of the guaranty, it would repay to the United States any amounts received by it from such *advances* in excess of the guaranty, with interest at 6 per cent per annum from the time such *excess* was paid, and the Secretary of the Treasury directed the Great Northern to secure performance of the contract by executing and delivering to him its promissory notes for the amounts and by pledging as security for payment to the United States and the performance of the contract Liberty Bonds in the amount of $1,625,000. The contract provided that in the event of default of repayment by Great Northern of any sum due thereunder, the Secretary should have the right to sell and dispose of the Liberty Bonds; and if, "upon the final determination by the Commission of the amount of guaranty due," it should be found that the *advances* received were less than or did not exceed the amount of the guaranty, the Secretary would release the bonds. (R. 3, 4.)

From the Commission report (111 I. C. C. 319; R. 83) it appears that the advance payments were based upon sworn statements submitted by the carriers and upon other available data such as annual and monthly reports on file with the Commission. In view of the necessities of the carriers and the urgency of their requests for further payments the Commission recommended to Congress such legislation as would meet the situation, and in response thereto Congress enacted Section 212, which provided for partial payments. Apparently until Section 212 was enacted, further payments had been suspended; for on March 1, 1921 (only three days after Section 212 was approved) and with $6,500,000 already in their possession, Great Northern applied for further advances and the Commission certified and the Secretary of the Treasury paid the further sum of $6,000,000. That brought the total to the $12,500,000. (R. 5.)

In its report the Commission says (111 I. C. C. 321; R. 85):

> The making of the certifications for partial payments before field check could be made of the sworn data submitted by the carriers, and prior to the final determination of the principles governing the guaranty payments, led to overpayments to 35 carriers. Of these, 28 have reached final settlement, 22 have refunded the overpayment or promised to do so, and 6, including the carrier, have neither repaid nor promised to repay.

Great Northern further alleges that on December 15, 1921, the Commission fixed December 31, 1921, as the date on which all accounts pertaining to the guaranty period should be closed for the purpose of computing the guaranty and the Great Northern was allowed until June 15, 1922, to file final statement of amount due. On June 15, 1922, Great Northern filed a statement claiming as the total amount of its guaranty the sum of $17,599,756.42 and as the balance remaining due, after deducting advances, the sum of $5,099,756.42. (R. 5.) Subsequently, in conference with the Commission's representatives these figures were reduced to $17,421,650.35 and $4,921,650.35. Great Northern had protested that the certificate of March 1, 1921, definitely ascertaining that the sum of $6,000,000 was due to Great Northern was a final determination of the *minimum* amount due to the extent of the sum so ascertained, and the Commission was without jurisdiction to consider any reduction or any question at all other than what additional sum should be certified over $12,500,000. (R. 6.)

Great Northern further alleges that on June 17, 1925, the Commission wrongfully and unlawfully determined the total amount due was $11,178,887.31 and there was due to the United States under Section 209 (g) a refund of $1,321,112.69; and the Commission wrongfully and unlawfully issued its certificate, reciting Great Northern was indebted to the United States in that amount; that the Commis-

sion delivered the certificate to the Secretary of the Treasury and *he thereupon demanded of petitioner that it refund and pay to the United States* the amount; that the Commission wrongfully and without any jurisdiction or authority sought to modify its definite ascertainment under Section 212 and to reduce the amount which it had definitely ascertained and to require a large part thereof to be paid back. (R. 6, 7.)

Great Northern appears never to have been certain of its claim. On March 26, 1921, Great Northern submitted a revision of its return computed entirely in accordance with the Railway Executives' formula showing $18,645,653.32 as the amount necessary to make good its guaranty. Great Northern later filed a return, designated as final, in which it claimed $17,599,756.42. On July 2, 1925, it stated in a brief that $15,705,688 was approximately correct and the amount found due should be "at least $15,000,000" (R. 84), although it prayed in the same brief that the Commission issue a certificate "declaring that no refund is due from the carrier and that there still remains due to the carrier under the guaranty such additional amounts as the Commission may determine," thus indicating a minimum claim of $12,500,000, the amount already paid, plus as much more as might be considered reasonable and just (R. 84).

On June 17, 1925, the Commission issued a report (99 I. C. C. 231) and certificate (R. 23)

certifying an overpayment of $1,321,112.69. Subsequently the claim was reargued before the full Commission. On June 8, 1926, the Commission issued the second report and amended certificate (111 I. C. C. 318; R. 81; R. 106) by which it cancelled the certificate of June 17, 1925, and certified the total amount due as $11,170,214.02. The amended certificate was delivered to the Secretary of the Treasury.

Alleging that the amended certificate issued to the Secretary of the Treasury by the Interstate Commerce Commission under Section 209 (g) of the Transportation Act of 1920, certifying that $11,170,214.02 is the amount necessary to make good the guaranty provided by Section 209, and that a previous certificate certifying an overpayment of $1,321,112.69, dated June 17, 1925, constitute orders of the Interstate Commerce Commission, Great Northern Railway brought the suit "to enjoin, set aside, annul, and suspend" the amended certificate. (R. 1.)

Attached to the petition is a copy of an agreement dated September 20, 1926 (R. 26), which recites the United States asserted a claim of $1,329,785.98, with interest, and the Comptroller General deemed it to be his duty to withhold from Great Northern payments due from the United States for transportation of mail, freight, and passengers. The United States and Great Northern agreed the latter should deposit $1,625,000 in Government

securities with the Comptroller General, who shall deposit them with the Treasurer of the United States for safekeeping, as security for the refund of the overpayment, the Comptroller General to continue payments for the transportation. (R. 26, 27.)

The agreement recites that an action against the United States to test the validity of its claim for overpayment is contemplated and the Government securities are to be held by the Comptroller General pending the final determination of the claim; if the determination is in favor of the United States and the claim is not otherwise paid, the securities shall be sold and the proceeds applied on account of the amount so determined; if the final determination shall be in favor of Great Northern the securities shall be delivered back to it. (R. 27.)

The agreement recites the claim shall be deemed to have been finally determined when it shall have been decided by the court of last resort having jurisdiction, and a certified copy of the decree of court making the final determination shall be deemed to be satisfactory evidence thereof. (R. 28.)

Seizing upon the two certificates as "orders" of the Commission on which to hang a suit in equity, Great Northern alleges it is advised by its counsel (R. 21) that it could not have attacked the order collaterally "but that an action in the nature of this proceeding now brought would have been necessary to *cancel* the said order of the Commission and to avoid such counterclaim." The prayer for relief is that the United States "be restrained and en-

joined from disposing of any of said Liberty Bonds, and from withholding from petitioner the said Liberty Bonds and the interest coupons thereon, and any thereof; and that defendant be restrained and enjoined from withholding any payments due from the United States to petitioner and from asserting the said certificate of the Commission as an offset against any such indebtedness, and that the use of said order or certificate for any purpose whatever by the United States, or any official thereof, be perpetually enjoined." (R. 21.)

Pursuant to Equity Rule 29, the United States incorporated in its answer (R. 75), as in *Pennsylvania Railroad* v. *Railroad Labor Board,* 261 U. S. 72, 73; *United States* v. *Los Angeles & Salt Lake Railroad,* 273 U. S. 299; *United States* v. *Kansas City Southern Railway,* 275 U. S. 00, its separate defenses, including motions to dismiss for want of jurisdiction which may be thus summarized: first, the certificates issued by the Commission to the Secretary of the Treasury are not "orders" within the meaning of Urgent Deficiencies Act; second, the United States has not consented to be sued in the District Court in this manner in this transaction; third, the Commission is the sole authority to ascertain and certify the guaranty and its action in so far as it is challenged in this proceeding is final.

There was also a motion to dismiss for insufficiency of fact to state a cause of action in equity but that motion was not heard.

After argument on the questions of jurisdiction, without further hearing the District Court took the case under advisement. In its order of October 1, 1927 (R. 107), all three motions to dismiss for want of jurisdiction were sustained. Subsequently, October 20, 1927 (R. 110), the Court filed its amended order in which it eliminated the third ground, viz, "that in this proceeding the certificates of the Interstate Commerce Commission must be taken as final and conclusive (R. 109)."

SUMMARY OF ARGUMENT

The amended certificate and the agreement neither separately nor together constitute "any order" of the Interstate Commerce Commission within the meaning of the Urgent Deficiencies Act over which the specially constituted District Court may exercise jurisdiction; but the suit obviously is designed to cancel or to suppress the certificate and to enjoin the Secretary of the Treasury and the Comptroller General from carrying out the terms of the agreement which was voluntarily entered into by the Great Northern for its own protection.

The United States has not consented to be sued in this manner, as obviously the whole transaction relates to an adjustment of compensation which is not a subject within the equitable jurisdiction under the Urgent Deficiencies Act.

Great Northern and United States are the direct parties in interest in the settlement as between themselves. The transaction does not arise

out of the Interstate Commerce Act in which the public interest is involved but out of Section 209 of the Transportation Act of 1920 which was designed to liquidate the World War; and the emergencies for invoking the jurisdiction under Urgent Deficiencies Act are wholly lacking.

The hearing in the District Court, the decree and the three assignments of error were all limited to the questions of jurisdiction only; and in the absence of rulings of the District Court and appropriate assignments of error counsel for Great Northern should not be heard here on the merits.

ARGUMENT

I

THE AMENDED CERTIFICATE ISSUED BY THE COMMISSION TO THE SECRETARY OF THE TREASURY IS NOT AN "ORDER"

There is no statutory line running from the specially constituted District Court to the Commission by which a decree of cancellation of the certificate may be sent; nor is there such a line running from that court to the Secretary of the Treasury and/or the Comptroller General over which an injunction decree may be sent.

Although Great Northern is named therein, the certificate of overpayment runs from the Commission to the Secretary of the Treasury who has made demand for the refund; but it can not successfully be maintained the demand is an *order* of the Commission and the basis for an injunction decree.

Finally, the voluntary agreement of September 20, 1926, between Great Northern and United States, is not an *order* of the Commission. (R. 26.)

Great Northern alleges it is "advised by its counsel that it could not have attacked said order collaterally" (R. 21) and yet it alleges that the certificate is absolutely null and void as beyond the power and authority of the Commission to issue. These allegations are self-destructive (*Illinois Central* v. *Public Utilities Commission,* 245 U. S. 493).

The much-worn argument that "*any* order" is justicable under the Commerce Court Act which provides for jurisidiction over "cases brought to enjoin, set aside, annul, or suspend in whole or in part 'any order' of the Commission" because the words "any order" mean any action whatsoever taken by the Commission, has been repeatedly rejected. Thus the words "any order" do not include an order of the Commission which dismissed a complaint, *Proctor & Gamble* v. *United States,* 225 U. S. 282; or an order denying an application by a railroad company to continue the operation and stock ownership of a steamship line under the Panama Canal Act (c. 390, 37 Stat. 560, 566), *Lehigh Valley Railroad* v. *United States,* 243 U. S. 412, affirming 234 Fed. Rep. 682; or an order fixing the date of a hearing on a complaint pending before the Commission, *United States* v. *Illinois Central Railroad,* 244 U. S. 82; or an order declaring the tentative valuation of the property of a railroad

company, *Delaware & Hudson* v. *United States,* 266 U. S. 438, or an order reopening a tentative valuation of railway property for further hearing, *New York, Ontario & Western* v. *United States,* 273 U. S. 652.

In *United States* v. *Los Angeles & Salt Lake Railroad,* 273 U. S. 299, 309, 314, the suit was commenced in the District Court for the Southern District of California to annul and enjoin the use for any purpose of the final valuation of the company's properties in any proceeding. On the authority of the *Delaware & Hudson case* the District Court took jurisdiction (4 F. (2d) 736), and later annulled the valuation and permanently enjoined its use (8 F. (2d) 747). In reversing the decree, this Court said:

> The final report on value, like the tentative report, is called an order. But there are many orders of the Commission which are not judicially reviewable under the provision now incorporated in the Urgent Deficiencies Act. See *Procter & Gamble Co.* v. *United States,* 225 U. S. 282; *Hooker* v. *Knapp,* 225 U. S. 302; *Lehigh Valley R. R. Co.* v. *United States,* 243 U. S. 412; *United States* v. *Illinois Central R. R. Co.,* 244 U. S. 82, 89; *Delaware & Hudson Co.* v. *United States,* 266 U. S. 438. For the first nineteen years of the Commission's existence no order was so reviewable. The statutory jurisdiction to enjoin and set aside an order was granted in

1906, because then, for the first time, the rate-making power was conferred upon the Commission, and then disobedience of its orders was first made punishable. Hepburn Act, June 29, 1906, c. 3591, §§ 2–7, 34 Stat. 584, 586–595. The first suit to set aside an order was brought soon after. *Stickney* v. *Interstate Commerce Commission,* 164 Fed. 638; 215 U. S. 98. The jurisdiction conferred by the Hepburn Act was transferred, substantially unchanged, to the Commerce Court, by the Act of June 18, 1910, c. 309, § 1, 36 Stat. 539; and, when that court was abolished, to the district courts, by the Urgent Deficiencies Act. The so-called order here assailed differs essentially from all those held by this Court to be subject to judicial review under any of those Acts. Each of the orders so reviewed was an exercise either of the quasi-judicial function of determining controversies or of the delegated legislative function of rate making and rule making.

The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, anything; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation. This so-called order is merely the formal record of conclusions

reached after a study of data collected in the course of extensive research conducted by the Commission, through its employees. It is the exercise solely of the function of investigation. Compare *Smith* v. *Interstate Commerce Commission*, 245 U. S. 33. Moreover, the investigation made was not a step in a pending proceeding in which an order of the character of those held to be judicially reviewable could be entered later. It was merely preparation for possible action in some proceeding which may be instituted in the future—preparation deemed by Congress necessary to enable the Commission to perform adequately its duties, if and when occasion for action shall arise. The final report may, of course, become a basis for action by the Commission, as it may become a basis for action by Congress or by the legislature or an administrative board of a State. But so may any report of an investigation, whether made by a committee of Congress or by the Commission pursuant to a resolution of Congress or of either branch thereof.

* * * * *

Little need be added concerning the further contention that the suit should be entertained under the general equity power of the court. Two arguments are urged in support of the proposition. One is that since the Commission has by reason of errors of law and of judgment grossly undervalued the property, its report will, unless suppressed, injure the credit of the carrier with the public. The other is that the Commission may

itself be misled into illegal action by the erroneous conclusions and may apply them to the carriers' injury, since use of the final valuation is required in making rates pursuant to § 15a of the Act to Regulate Commerce, as amended by Transportation Act, c. 91, § 421, 41 Stat. 456; in prescribing divisions of joint rates under § 15; in determining the limit upon the amount of capitalization, in the event of a consolidation under § 5; in determining the propriety of an issue of securities, under § 20a; or as the basis of computation of the amount of excess earnings to be recaptured under § 15a. Neither argument is persuasive. The first reminds of the effort made in *Pennsylvania R. R. Co.* v. *United States Railroad Labor Board,* 261 U. S. 72, to suppress the report of that board. The second reminds of the attempt to secure a declaratory judgment in *Liberty Warehouse Co.* v. *Grannis, ante,* p. 70; and, also, of cases in which it was sought to enjoin a municipality from passing an illegal ordinance. Compare *New Orleans Waterworks Co.* v. *New Orleans,* 164 U. S. 471, 481; *McChord* v. *Louisville & N. Ry. Co.,* 183 U. S. 483.

Obviously the petition on its face is not one to enjoin an order of the Commission. The suit is designed to cancel the certificate and to enjoin the Secretary of the Treasury and the Comptroller General from carrying out the terms of the agreement which was entered into by Great Northern for its own benefit. If the amended certificate was not an order when it was issued, the subsequent action

of the Comptroller General and the agreement with respect thereto did not convert it into an order.

Without an order of the Commission the suit may not be maintained against the United States. Even with an order of the Commission the suit may not be maintained against the Secretary of the Treasury and the Comptroller General. There is no affirmative order of the Commission which may result in any irreparable injury or damage in case the order is finally held invalid. It is not pretended that such a situation exists here. One of the arguments advanced in the *Los Angles & Salt Lake case* was that the Commission's valuation was an "outstanding menace."

Even if the amended certificate is an outstanding evidence of indebtedness, equity proceedings will not lie for its cancellation and suppression. *United States* v. *Los Angeles & Salt Lake Railroad, supra.*

Great Northern counsel in their brief quote from the foregoing language of the Court in the *Los Angeles & Salt Lake Case* and argue that the amended certificate assumes the character of evidence. They do not pretend that any penalty attaches for its nonobservance but they say "Plainly the certificate now before us does purport to determine rights and obligations," and its effect is "to create a cause of action in favor of the Government." (Br. 33, 34.) The amended certificate is not even directed to the Great Northern. Knowl-

edge or notice of the certificate comes to it through a demand made by the Secretary of the Treasury. Even if the order is evidence in a suit against the Great Northern, it would seem that it would be time enough to assail its validity when the certificate is brought forward in the suit. Suits may not be brought before the specially constituted District Court under Urgent Deficiencies Act to suppress evidence or a cause of action. *Meeker* v. *Lehigh Valley,* 236 U. S. 412, 430; *Mills* v. *Lehigh Valley,* 238 U. S. 473, 482; *Spiller* v. *Atchison, Topeka & Santa Fe,* 253 U. S. 117, 131, 132; *St. Louis Southwestern* v. *Commission,* 264 U. S. 64, 77; *Pittsburgh & West Virginia Railway* v. *United States,* 6 F. (2d) 646, 648, 649; *United States* v. *Los Angeles & Salt Lake Railroad, supra.*

II

THE UNITED STATES HAS NOT CONSENTED TO BE SUED IN THIS MANNER IN THIS TRANSACTION

In the instant case Great Northern and the United States are the direct parties in interest. The United States made the guaranty on certain terms and conditions pursuant to which Great Northern received from the United States money of the United States. The latter claims an overpayment which the Great Northern disputes. Notwithstanding it deposited Liberty Bonds as security, Great Northern has brought the injunction suit to prevent interference by the United States in its endeavor to recover the money. The transaction is between the Great Northern and the United

States exclusively. Consent that the United States may be sued in such a transaction in the specially-constituted District Court is not found in the Urgent Deficiencies Act and does not exist. *Minnesota* v. *Hitchcock,* 185 U. S. 373, 382, 387; *Oregon* v. *Hitchcock,* 202 U. S. 60, 68; *Illinois Central Railroad* v. *Public Utilities Commission,* 245 U. S. 493. The decree of the court would be no more than merely advisory as in *Liberty Warehouse Company* v. *Grannis,* 273 U. S. 70; *New Jersey* v. *Sargent,* 269 U. S. 328; *Fairchild* v. *Hughes,* 258 U. S. 126; *Massachusetts* v. *Mellon,* 262 U. S. 447; *Texas* v. *Interstate Commerce Commission,* 258 U. S. 158, 162.

In a suit to set aside an order of the Commission under Urgent Deficiencies Act the United States is made by a statute a necessary party and this means that it is to stand in judgment as representing the public. *Illinois Central Railroad* v. *Public Utilities Commission,* 245 U. S. 493, 505. In this case the United States is sued in a money transaction with which Great Northern alone is concerned.

The petition prays the Court to render ineffective an agreement voluntarily entered into and to enjoin the United States from carrying out the terms of the same without designating or indicating any officer or officers of the United States or any person or persons acting or refusing to act for and on behalf of the United States against whom such an injunction may issue. The suit is unique.

III

THE MERITS OF THE CASE ARE NOT HERE

Notwithstanding by the amended decree the District Court limited its order of dismissal to jurisdiction only (R. 107, 110), counsel for Great Northern, in addition to the jurisdictional questions, have argued at great length the merits of the case and conclude (Br. 68): "We do not ask that this Court find as a fact the amount necessary to make good the guaranty. We simply ask the Court to state the correct rules of law, and, if it determines that the Commission has erred as a matter of law, to enjoin the erroneous certificate."

They say they do this because of the undetermined motion to dismiss for insufficiency of fact (R. 77) which it is now incumbent upon them to oppose (Br. 47).

The only three assignments of error relate to questions of jurisdiction only. Obviously there could not be other assignments of error as no other rulings were made. The merits, therefore, were neither determined by the District Court nor are they here on this appeal by appropriate assignments of error.

CONCLUSION

The decree of the District Court was correct and should be affirmed.

WILLIAM D. MITCHELL,
Solicitor General.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

APRIL, 1928.

APPENDIX A

THE COMMERCE COURT ACT (C. 309, 36 STAT. 539)

That a court of the United States is hereby created which shall be known as the commerce court and shall have the jurisdiction now possessed by circuit courts of the United States and the judges thereof over all cases of the following kinds:

First. * * *.

Second. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

Third. * * *.

Fourth. * * *.

The jurisdiction of the Commerce Court over cases of the foregoing classes shall be exclusive; but this act shall not affect the jurisdiction now possessed by any circuit or district court of the United States over cases or proceedings of a kind not within the above-enumerated classes.

URGENT DEFICIENCIES ACT (C. 32, 38 STAT. 219; U. S. C. TITLE 28, SECS. 43, 46, 47)

The Commerce Court, * * * and the jurisdiction vested in said Commerce Court by said Act is transferred to and vested in the several district courts of the United States, and all Acts or parts of Acts in so far as they relate to the establishment of the Commerce Court are repealed * * *.

The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the Commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. * * *

The procedure in the district courts in respect to cases of which jurisdiction is conferred upon them by this Act shall be the same as that heretofore prevailing in the Commerce Court. * * * No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any District Court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance

to hear and determine the application two other judges * * *. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. * * *; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply.

APPENDIX B

TRANSPORTATION ACT OF 1920 (C. 91, 41 STAT. 464; U. S. C. TITLE 49, SEC. 77)

Guaranty to Carriers after Termination of Federal Control

SEC. 209. (a) When used in this section—

* * *

The term "guaranty period" means the six months beginning March 1, 1920.

The term "test period" means the three years ending June 30, 1917; and * * *

(b) This section shall not be applicable to any carrier which does not on or before March 15, 1920, file with the Commission a written statement that it accepts all the provisions of this section.

(c) The United States hereby guarantees—

(1) With respect to any carrier with which a contract (exclusive of so-called cooperative contracts or waivers) has been made fixing the amount of just compensation under the Federal Control Act, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than one-half the amount named in such contract as annual compensation, or, where the contract fixed a lump sum as compensation for the whole period of Federal operation, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than an amount which shall bear the same proportion to

the lump sum so fixed as six months bears to the number of months during which such carrier was under Federal operation, including in both cases the increases in such compensation provided for in section 4 of the Federal Control Act.

(2) With respect to any carrier entitled to just compensation under the Federal Control Act, with which such a contract has not been made, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than one-half of the annual amount estimated by the President as just compensation for such carrier under the Federal Control Act, including the increases in such compensation provided for in section 4 of the Federal Control Act. If any such carrier does not accept the President's estimate respecting its just compensation, and if in proceedings under section 3 of the Federal Control Act it is determined that a larger or smaller annual amount is due as just compensation, the guaranty under this paragraph shall be increased or decreased accordingly. * * *

(g) The Commission shall, as soon as practicable after the expiration of the guaranty period, ascertain and certify to the Secretary of the Treasury the several amounts necessary to make good the foregoing guaranty to each carrier. The Secretary of the Treasury is hereby authorized and directed thereupon to draw warrants in favor of each such carrier upon the Treasury of the United States, for the amount shown in such certificate as necessary to make good such guaranty. An amount sufficient to pay such warrants is hereby appropriated out of any money in the Treasury not otherwise appropriated.

(h) Upon application of any carrier to the Commission, asking that during the guaranty period there may be advanced to it from time to time such sums, not in excess of the estimated amount necessary to make good the guaranty, as are necessary to enable it to meet its fixed charges and operating expenses, the Commission may certify to the Secretary of the Treasury the amount of, and times at which, such advances, if any, shall be made. The Secretary of the Treasury, on receipt of such certificate, is authorized and directed to make the advances in the amounts and at the times specified in the certificate, upon the execution by the carrier of a contract, secured in such manner as the Secretary may determine, that upon final determination of the amount of the guaranty provided for by this section such carrier will repay to the United States any amounts which it has received from such advances in excess of the guaranty, with interest at the rate of 6 per centum per annum from the time such excess was paid. There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, a sum sufficient to enable the Secretary of the Treasury to make the advances referred to in this subdivision.

AMENDMENT OF FEBRUARY 26, 1921 [1] (C. 72, 41 STAT. 1145; U. S. C. TITLE 49, SEC. 79)

SEC. 212. (a) In making certifications under section 204 or section 209, the Commission, if not at

[1] The 35th Annual Report of the Commission to Congress, 1921, page 22, contains an account of the status of the adjustments of the six months' guaranty after termination of Federal Control.

Representative Esch, from the Committee of Conference of the two Houses, on February 18, 1920, submitted Confer-

the time able finally to determine the whole amount due under such section to a carrier or the American Railway Express Company, may make its certificate for any amount definitely ascertained by it to be due, and may thereafter in the same manner make further certificates, until the whole amount due has been certified. The authority of and direction to the Secretary of the Treasury under such sections to draw warrants is hereby made applicable to each such certificate. Warrants drawn pursuant to this section, whether in partial payment or in final payment, shall be paid: (1) If for a payment in respect to reimbursement of a carrier for a deficit during the period of Federal control, out of the appropriation made by section 204; (2) if for a payment in respect to the guaranty to a carrier other than the American Railway Express Company, out of the appropriation made by subdivision (g) of section 209; and (3) if for a payment in respect to the guaranty to the American Railway

---

ence Report No. 650 to the House of Representatives, which contained the following provisions (p. 58): "Advances.—The House Bill made provision for advances to the carrier during the guaranty period, not in excess of the estimated amount of guaranty, to enable it to meet its fixed charges and operating expenses, upon execution of properly secured contracts for repayment of any overpayments. The Senate Bill contained no such provision, which the Conference Bill retains." House Reports, Vol. 1, 66th Cong., 2nd Sess., 1919–1920.) See also Report No. 456 of Committee on Interstate and Foreign Commerce, House of Representatives, November 10, 1919, page 13 (House Reports, Vol. 2, 66th Cong., 1st Sess., 1919), and Report No. 1243, Committee on Interstate and Foreign Commerce, January 26, 1921, on the purpose of the bill which authorized the Commission to certify partial payments to carriers under Sections 204 and 209. (House Reports, Vol. 1, 66th Cong., 3d Sess., 1920–1921.)

Express Company, out of the appropriation made by the fifth paragraph of subdivision (i) of section 209.

(b) In ascertaining the several amounts payable under either of such sections, the Commission is authorized, in the case of deferred debits and credits which can not at the time be definitely determined, to make, whenever in its judgment practicable, a reasonable estimate of the net effect of any such items, and, when agreed to by the carrier or express company, to use such estimate as a definitely ascertained amount in certifying amounts payable under either of such sections, and such estimates so agreed to shall be prima facie but not conclusive evidence of their correctness in amount in final settlement.

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Office Supreme Court, U. S.
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CHARLES ELMORE CROPLEY
CLERK

No. 612

In the Supreme Court of the United States

OCTOBER TERM, 1927

GREAT NORTHERN RAILWAY COMPANY, APPELLANT

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA

BRIEF FOR INTERSTATE COMMERCE COMMISSION

DANIEL W. KNOWLTON,
For Interstate Commerce Commission.

P. J. FARRELL,
Of Counsel.

APRIL 12, 1928.

U. S. GOVERNMENT PRINTING OFFICE: 1928

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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 612

GREAT NORTHERN RAILWAY COMPANY, APPELLANT
v.
THE UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION, appellees

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

OPINION OF THE COURT BELOW

The opinion of the court below is reported in 22 F. (2d) 865.

STATEMENT OF THE CASE

This is an appeal under the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 219), from an order of the District Court for the District of Minnesota, consisting of Circuit Judge William S. Kenyon and District Judges John B. Sanborn and Joseph A. Molyneaux, sitting pursuant to said Urgent Deficiencies Act, which order dismissed for

want of jurisdiction, a petition of the appellant steam railroad for a permanent injunction to set aside, annul and suspend a certificate issued by the Interstate Commerce Commission, certifying the amount due to appellant under section 209 of the Transportation Act, 1920, commonly known as the guaranty section, and to enjoin the United States from disposing of certain liberty bonds held pursuant to a certain contract, from withholding said bonds and interest coupons thereon from the appellant, from withholding any payments due the appellant and from asserting and using the certificate of the Commission as an offset to such indebtedness or for any purpose whatever.

EVENTS LEADING UP TO THE SUIT

By Presidential Proclamation of December 26, 1917, issued under authority of the Army Appropriation Act of August 29, 1916, and by virtue of all other powers thereto enabling, substantially all railroads of the country were taken under Federal control. Compensation for their use was provided for by the Federal Control Act of March 21, 1918, and was based, generally speaking, upon the railroads' average net railway operating income during a test period prior to the war, namely, the three years ended June 30, 1917, which sum, commonly known as standard return, was to be ascertained and certified to by the Interstate Commerce Commission for use in agreements between the President and the carriers. If the carrier should be dis-

satisfied with the standard return it could, under the Act, submit the question of compensation to a board of referees with privilege of appeal from their determination to the Court of Claims.

On December 30, 1918, the Director General of Railroads, acting for the President, entered into an agreement with the petitioner, Great Northern Railway, which was in its general terms, the standard form of contract adopted by the Railroad Administration for general use. (R. 39.) The aggregate annual compensation to be paid the railroad was named in the contract but was made subject to any corrections in computations, or in line with accounting regulations, that might thereafter be certified by the Commission. The appellant expressly accepted the rights arising out of the contract in full settlement for compensation under the Constitution and laws of the United States and for any loss or damage that might result from the taking, use, control, and operation of its properties. (R. 46–47.)

By the Transportation Act, 1920, the railroads of the country were on March 1, 1920, relinquished to their owners. Although all constitutional and legal obligations on account of the taking and use of the railroads had already been taken care of, as above set forth, that Act in line with the Government's generous policy toward the railroads, contains two grants, the one, section 204, granting to railroads that had been relinquished prior to the termination

of general Federal control and had subsequently sustained deficits during the control period a continuance for the control period subsequent to their relinquishment of the compensation paid them while actually used by the Government, the other, section 209, in substance guaranteeing the railroads which were under Federal control at the termination thereof a continuance of such compensation for the six months following their relinquishment to private management. The gratuity provisions of section 204 are of interest in this case only to the extent that the court decisions thereunder are applicable to analogous circumstances arising under section 209. The provisions of section 209 are directly involved in this case.

By section 209 the United States guaranteed to any carrier filing written acceptance of the terms thereof on or before March 15, 1920, a net railway operating income for the six months following Federal control (March 1 to August 31, 1920) equal to one-half its federal control compensation. Such carrier in turn agreed to pay to the United States any sums earned in excess of the guaranty. The commission was designated to ascertain and certify to the Secretary of the Treasury the amount due under the guaranty, and, as a necessary corollary thereto, to determine the proper allowances in maintenance expenditures and other operating expenses in arriving at the amount by which the net income in fact earned during the guaranty period was less than the guaranteed net income. Recog-

nizing the difficulties of early ascertainment of the whole amount due and the urgent needs of the carriers, subdivision (h) of section 209 authorized the Secretary of the Treasury to make advances, during the guaranty period, of amounts certified to by the Commission as necessary to meet a particular railroad's fixed charges and operating expenses, but not in excess of the estimated amount necessary to make good its guaranty. In compliance with this paragraph the Commission issued its certificate for such advances to many railroads during the guaranty period, such certificates necessarily being based in large measure on the unchecked returns and estimates of the carriers, since the guaranty period was not then ended. Following the guaranty period the Commission found that the early ascertainment of the amounts due the carriers under the guaranty was a practical impossibility. Because of deferred debits and credits the accounts for the six-month guaranty period could not be definitely closed Moreover, the amounts charged by the carriers to operating expense during the guaranty period could not be accepted without examination for the reason that the act imposed upon the Commission the duty of scrutinizing such charges and, in the case of amounts charged to maintenance and depreciation of property, required it to adjust the same to the basis of the test period charges, making proper allowance for changes in the price of labor and materials and for

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differences in amount and use of property involved. In recognition of the difficulties confronting the Commission in making final determinations of amounts due, and, indeed, upon recommendation of the Commission, Congress by amendment of February 26, 1921, added Section 212 to the Transportation Act, 1920, whereby the Commission was authorized, if not at the time able to ascertain the whole amount due, to certify to the Secretary of the Treasury partial payments in amounts definitely ascertained to be due.

During the guaranty period the Secretary of the Treasury made advances, under subdivision (h) of section 209, of $6,500,000 to appellant, based upon the Commission's certificate, and received from it a contract secured by $1,675,000, face value of liberty bonds, to reimburse the government if such advances should prove to exceed the guaranty. Following the guaranty period the Secretary of the Treasury made partial payments under section 212 in the further sum of $6,000,000, based upon the Commission's certificate that that amount in addition to sums theretofore certified was definitely due the appellant. (R. 22.) Final adjustment of the appellant's accounts disclosed that these advance payments were in excess of the total amount due it under the guaranty, and the Commission, thereupon, issued its certificate of June 17, 1925, certifying that the whole amount due (including amounts of $75,698.89 and $31,418.88 due, respectively, to

two certain subsidiaries of appellant (R. 6)) was $11,178,887.31 and that the amount due the United States on account of overpayment was $1,321,-112.69. (R. 23–24.) 99 I. C. C. 231. On petition of appellant the proceeding was reopened for argument and further consideration before the entire Commission. The Commission's final report found that items amounting to $98,444.48 credited to income during the guaranty period properly belonged to the earlier operations under the Director General. 111 I. C. C. 318. This decreased the net railway operating income of the guaranty period and increased to the same extent the amount due the carrier under section 209, which increase was taken into consideration in the Commission's certificate of June 8, 1926, whereby the aggregate amount due appellant and its said subsidiaries was certified as $11,277,331.79 and the amount due appellant alone $11,170,214.02. This certificate cancelled the earlier certificate of June 17, 1925, and further, although setting forth the advance payments that had been certified aggregating an amount in excess of the whole amount found due, it did not in terms certify that any sum was due the United States, for the reason presumably that the Commission's authority under the Act is only to certify to the Secretary of the Treasury the amounts due from the United States to the carriers. (R. 24–26.)

The Secretary of the Treasury, upon receipt of the certificate, requested reimbursement of the

overpayment. Following the appellant's refusal to comply the Comptroller General withheld mail pay accruing to the carrier and finally a contract was entered into with the Comptroller General, secured by deposit of liberty bonds, whereby appellant agreed to make good the overpayment if the government's right thereto was sustained by court of last resort. (R. 26–30.)

PROCEEDINGS IN THE LOWER COURT

This suit was then instituted against the United States whereby the lower court was asked to set aside the Commission's certificate of final ascertainment of the whole amount due under the guaranty, to enjoin the United States from disposing of said liberty bonds and from withholding any payments due petitioner, and to enjoin the United States or any official thereof from asserting or using said certificate as an offset against such indebtedness, or for any purpose whatsoever. (R. 1.) The United States filed its answer and motion to dismiss for lack of jurisdiction in the court. (R. 75.) The Interstate Commerce Commission intervened and filed answer and likewise moved to dismiss for lack of jurisdiction in the court. (R. 30, 108.) The court, consisting of the 3 judges above named, convened and sitting pursuant to the Urgent Deficiencies Act of October 22, 1913, ordered that the question of jurisdiction be first argued and determined, and, after oral argument, fixed the time within which briefs should be filed on that question.

Briefs were filed and on October 1, 1927, the court entered its order dismissing the petition for lack of jurisdiction on the grounds "(1) that the certificates are not orders which can be enjoined or annulled under the provisions of the acts giving this court jurisdiction to review orders of the Interstate Commerce Commission; (2) that Congress has not consented that the United States be sued in this court in this proceeding." (R. 107–112.)

APPELLANT'S CONTENTIONS

The appellant's contentions are in substance:

That the Commission's certificate under section 209 of the Transportation Act, 1920, is an "order" within the meaning of the Commerce Court Act and the Urgent Deficiencies Act and that those Acts constitute the Government's consent to be sued in this case.

Appellant also contends that the Commission's certificate was erroneous as a matter of law. This goes to the merits but is justified by appellant on the ground that one of the motions for the defense challenges the sufficiency of the facts alleged in the petition. Nevertheless the sole question heard by the lower court was as to whether it had jurisdiction in respect of the Commission's certificate. (R. 110.) It dismissed the petition for lack of jurisdiction (R. 112) and accordingly this contention of appellant is not relevant to the issues raised by the appeal.

ARGUMENT

SUMMARY

I. The Government's consent to be sued in respect of the amount of its guaranty can not be found in the district court's special jurisdiction under the Urgent Deficiencies Act.

1. That special jurisdiction, created as an amendment to the Interstate Commerce Act, was intended solely for review of orders relating to commerce regulation directed to carriers subject to the regulatory authority, and was never intended to afford review of a certificate directed, not to the carriers subject to regulatory authority, but to the Secretary of the Treasury, and relating, not to matters of commerce regulation, but to a governmental guaranty significantly excluded by the Act of its creation, Transportation Act, 1920, from those portions of that Act that were named amendments to the Interstate Commerce Act.

2. While the Urgent Deficiencies Act authorizes suits in name against the Government in respect of matters of commerce regulation, that authority can not be consistently or harmoniously enlarged to embrace suits involving the public money, which are suits, in substance as well as name, against the Government, and, where authorized at all, are provided for before a special tribunal, or by jurisdiction conferred upon the district courts limiting the monetary amount of the claim.

3. The court's jurisdiction under the Urgent Deficiencies Act to enjoin orders of the Commission

bears a reciprocal relationship to its jurisdiction to enforce such orders, and the Commission's certificate, directed to the Secretary of the Treasury rather than to the carriers and being, moreover, for the payment of money, clearly falls outside the enforcement side of the court's special jurisdiction over regulatory orders and therefore should be reciprocally excluded from the enjoining side of that jurisdiction.

4. The fact that the guaranty section is in substance a gratuity and the fact that its terms, agreed to by the carriers, clothe the Commission with broad discretion in the premises without provision for appeal from its determination rebut any possible implication that the Government intended that the Urgent Deficiencies Act should constitute its consent to be sued in respect of the amount of its gift.

II. The Government's consent to this suit can not be found in any other legislation providing for suits against the United States in the district courts.

I

THE GOVERNMENT'S CONSENT TO BE SUED IN RESPECT OF THE AMOUNT OF ITS GUARANTY CAN NOT BE FOUND IN THE DISTRICT COURT'S SPECIAL JURISDICTION UNDER THE URGENT DEFICIENCIES ACT

It follows from the fundmental rule that the Government may not be sued without its consent that the only permissible suits against the United States are such as have been expressly consented to. The Government has consented to be sued in the Court

of Claims in respect of certain matters, including claims founded upon acts of Congress (except pension Acts) and upon contracts, express or implied. It has consented to be sued in the district courts in respect of similar matters except where the claim involved exceeds $10,000. It has consented to be sued in other special instances, for example, in suits in the district courts to set aside orders of the Interstate Commerce Commission entered in performance of its duties under the Act to Regulate Commerce, as amended. Urgent Deficiencies Act (38 Stat. 219). Mention should also be made of that class of cases against officials or agencies of the Government which are held not to be suits against the Government, although the official or agency committing the wrong assumes to act on behalf of the Government. These latter cases are not relevant here since this suit is, both in substance and name, one against the United States (see cases cited in *Ex Parte Young,* 209 U. S. 123, 150, 151) and purports to be brought under the Urgent Deficiencies Act.

1. That special jurisdiction, created as an amendment to the Interstate Commerce Act, was intended solely for review of orders relating to commerce regulation directed to carriers subject to the regulatory authority, and was never intended to afford review of a certificate directed, not to the carriers subject to regulatory authority, but to the Secretary of the Treasury, and relating, not to matters of commerce regulation, but to a governmental guaranty significantly excluded by the Act of its creation, Transportation Act, 1920, from those portions of that Act that were named amendments to the Interstate Commerce Act.

It is true, as urged by appellant, that the court's special jurisdiction under the Urgent Deficiencies Act to enjoin orders of the Commission includes not only mandatory orders but permissive orders as well; that is to say, orders permitting acts by the carriers which require the Commission's precedent authority. It is true that under court decisions such orders may take the form of certificates if the substance thereof constitutes such Commission action as was intended by Congress to be subject to review. It is further true that the recent *Los Angeles Valuation Case,* 273 U. S. 299, indicates that one of the criterions of a reviewable order is as to whether or not the particular commission action is determinative of rights or obligations. But the *Los Angeles case* and all other decisions of the Supreme Court, passing upon what orders are enjoinable under the Urgent Deficiencies Act, have dealt with orders relating to commerce regu-

lation issued under the Act to Regulate Commerce and directed to carriers subject to the regulatory authority. The certificate here involved was issued pursuant to special legislation constituting no part of the Act to Regulate Commerce, and was directed not to the carriers subject to the regulatory authority, but to the Secretary of the Treasury. The Commission's recognition of the fact that its certificate could not properly be directed to or against the carriers is shown by the fact that, while its first certificate of the whole amount due also certifies that the overpayment shown was due from the carrier to the United States, its last certificate, cancelling that earlier certificate, corrects its earlier action in this particular and merely discloses that the overpayment existed without certifying that the amount was in fact due from the carrier. The Court's special jurisdiction under the Urgent Deficiencies Act was intended only as a part of the existing system for the regulation of interstate commerce under the Act to Regulate Commerce and can not be extended to afford review of Commission action as special arbiter of the amount of a governmental gift or guaranty enacted by special legislation constituting no part of the Act to Regulate Commerce.

The history of the court's special jurisdiction is outlined in *Proctor & Gamble Co.* v. *U. S.*, 225 U. S. 282, and in the *Los Angeles Valuation Case,* 273 U. S. 299. It is shown in those cases that the Commerce Court Act of 1910 created the commerce

court and conferred upon it jurisdiction to set aside, as well as to enforce orders of the Commission issued under the Act to Regulate Commerce, and that subsequently the Urgent Deficiencies Act abolished the commerce court and transferred its jurisdiction to the district courts. As showing that the court's special jurisdiction was created as an amendment to, and is confined to orders issued under the Act to Regulate Commerce, the following is quoted from the opinion in the *Proctor & Gamble Case,* pages 294–295:

> * * * It cannot be disputed that the act creating the Commerce Court was intended to be but a part of the existing system for the regulation of interstate commerce, which was established by virtue of the original adoption in 1887 of the act to regulate commerce, and which was expanded by the repeated amendments of that act which followed, developed in practical execution by the rulings of the body (Interstate Commerce Commission), upon whom was cast the administrative enforcement of the act, the whole eluciated and sanctioned by a long line of decisions of this court. That in adopting the provisions concerning the Commerce Court and making it part of the system, it was not intended to destroy the existing machinery or method of regulation, but to cause it to be more efficient by affording a more harmonious means for securing the judicial enforcement of the act to regulate commerce is certain. The act creating the Commerce Court (June 18, 1910, 36 Stat. 539,

> c. 309) was entitled "An Act to create a Commerce Court, and to amend the Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, as heretofore amended, and for other purposes." The first six sections, which called into being the Commerce Court and definied its powers, all demonstrate the purpose as above stated, that is, to adjust the powers and duties of the newly created court in such manner as to cause them to accord with the system of regulation provided by the act to regulate commerce as it then existed.

In view of the fact that the court's special jurisdiction was created as an amendment to the Act to Regulate Commerce (now officially cited as the Interstate Commerce Act, 41 Stat. 499) and as part of the existing system of commerce regulation, it is important to determine what relation the guaranty legislation, section 209, Transportation Act, bears to the Interstate Commerce Act. Title IV of the Transportation Act sets forth in detail the amendments and changes made to the Interstate Commerce Act under the heading "Amendments to Interstate Commerce Act" (41 Stat. 474). Section 209 is not included but is found under Title II headed "Termination of Federal Control" (41 Stat. 457), and the reason is not far to seek.

Section 209 guarantees to any carrier accepting its terms a net railway operating income for the six months following federal control, equal to one-half its annual federal control compensation as named in

its contract with the Director General, and the duty of scrutinizing the carriers accounts is placed with the Commission. Clearly these temporary duties in determining the net amount due under a grant of public monies to individual carriers are not related to its important and continuing duties to the general public in regulating rates and service. Because of its experience in railroad accounting the Commission was selected for the task just as other officials of the Government are frequently designated to administer special legislation apart from their regular duties. For example, special duties are imposed on the Secretary of the Interior under the "Retirement of Federal Employees Act" and special duties are imposed upon the Secretary of Commerce under the "Radio Commission Act." The Commission's fitness for the task imposed upon it very obviously does not necessarily constitute that task a part of its duties in regulating commerce. It is true, as suggested by appellant, that since the enactment of the Commerce Court Act the Commission's duties have been greatly enlarged, but, in so far as those duties pertain to commerce regulation, the enlargement has been a natural development. Each new duty added by amendment to the Interstate Commerce Act has been a logical outgrowth of duties theretofore exercised. The duty of ascertaining the amount due under a governmental gratuity or guaranty was not commerce regulation and was not therefore made, by amendment, a part of the Act to Regulate Commerce.

2. While the Urgent Deficiencies Act authorizes suits in name against the Government in respect of matters of commerce regulation, that authority can not be consistently or harmoniously enlarged to embrace suits involving the public money, which are suits in substance as well as name, against the Government and, where authorized at all, are provided for before a special tribunal, or by jurisdiction conferred upon the district courts limiting the monetary amount of the claim.

It has been shown that the Transportation Act, while designating certain of its provisions as amendments to the Interstate Commerce Act, excludes section 209 from that designation, presumably for the reason that the section pertains to a guaranty of public money and not to matters of commerce regulation. On these grounds alone it may be asserted with conviction that the special jurisdiction of the court, created in the manner above shown as an amendment to the Interstate Commerce Act and for the purpose of reviewing orders issued thereunder, are not here applicable. Furthermore, a construction permitting the review under the special code provisions of a governmental guaranty would not only be out of place in a system set up solely for commerce regulation, but likewise would not be in harmony with the general scheme of jurisdiction in respect of suits against the Government. This is shown in the *Procter & Gamble Case,* wherein the court says, at pages 299–300:

> * * * A. The first section of the act wherein is recited the jurisdiction of the Commerce Court which we have previously commented upon makes clear that the purpose was not to create a court with new and strange powers destructive of the previous well-established administrative authority of the Interstate Commerce Commission and *in conflict with the general jurisdiction vested in the courts of the United States*, but only to give to the new court the special jurisdiction then possessed by the courts of the United States for the enforcement of orders made by the Commission, and thus to unify the exertion of judicial power with reference to the enforcement of the orders of the Commission. The opening words of the section which makes this result clear are as follows: It (the Commerce Court) shall "have the jurisdiction now possessed by circuit courts of the United States and the judges thereof over all cases of the following kinds: * * *". (Italics ours.)

Prior to the Commerce Court Act suits involving Commission orders were brought against the Commission as defendant. *Hepburn Act, 1906,* 34 Stat. 592. They were, presumably, of that class of cases against officials or agencies of the government which are held not to be suits in substance against the sovereign, although the official or agency committing the wrong assumes to act on behalf of the government. *Ex Parte Young,* 209 U. S. 123. Obvi-

ously, therefore, the jurisdiction, transferred from the Circuit Courts to the Commerce Court, and from the latter subsequently transferred to the District Courts, was in respect of suits not in substance against the United States, and the provision in the Commerce Court Act that suits of such nature should be brought against the United States did not alter the fundamental nature of the suit but constituted merely the consent of the United States to be sued in name in respect of the Acts of its agent, the Commission, in performing its regulatory duties under the Interstate Commerce Act. The provision was never intended to constitute consent to a suit such as this, involving the gratuitous or contractual monetary rights or obligations of the government under the statutory guaranty and its indebtedness for carriage of the mails and seeking to restrain or control the acts of its officials taken or to be taken in the interest and for the protection of the public treasury, for suits of such nature are in substance as well as name suits against the sovereign. *Belknap* v. *Schild,* 161 U. S. 10, 18–19, 25 and cases cited; *International Postal Supply Co.* v. *Bruce,* 194 U. S. 601; *Goldberg* v. *Daniels,* 231 U. S. 218.

As will be later more fully shown section 209 of the Transportation Act constitutes in reality a mere gratuity or gift, in respect whereof it seems doubtful that the Government has, by any legisla-

tion, consented to be sued. If it should be considered that the carrier's acceptance of the terms of the section has effected a legally binding contract with the Government, then its remedy, if any there be other than that before the Commission, which is denied, is at law before a special tribunal provided for the purpose (Judicial Code, Section 145) or, within certain monetary limits, under the general jurisdiction of the District Courts (Judicial Code, section 24 (20); *Belknap* v. *Schild, supra,* 17), for although appellant is now withholding, and by this suit attempting to safeguard, an overpayment made to it by the Government, nevertheless its claim is in essence a monetary claim against the United States. To argue that the Commerce Court Act and the Urgent Deficiencies Act were intended to constitute consent to suits against the United States, which would confuse such a claim and likewise claims for carriage of the mails with equity suits arising under the Interstate Commerce Act is to argue that it was intended to set up a special jurisdiction "in conflict with the general jurisdiction vested in the courts of the United States."

Appellant argues that the public money might, because of the Government's capacity as a shipper or traveller, be involved in the usual injunction suit brought by a railroad against the United States to set aside an order of the Commission reducing

rates. In such case, however, the Government's interest as a shipper is subordinate to its broader interest as representing the general shipping public. In addition, the fixing of rates is commerce regulation and it does not follow from the fact that the United States has consented to be sued as to rate orders, even though remotely involving its proprietary interests as a shipper, that it has consented generally to be sued in claims directly and substantially involving its monetary and proprietary interests.

Moreover the Urgent Deficiencies Act, in transferring the jurisdiction of the Commerce Court to the District Courts, added special venue provisions, obviously primarily directed to the convenience of shippers, and provisions for hearings before three judges, expedited procedure and direct appeal to the Supreme Court. It seems clear that these provisions were intended only for the review of matters arising under the Interstate Commerce Act. That a jurisdiction of this nature should not be availed of for other purposes, thereby placing unnecessary demands on such special procedure and privilege of direct appeal, is indicated in *Moore, Insurance Commissioner* v. *Fidelity & Deposit Co.*, 272 U. S. 317, and *Smith* v. *Wilson*, 273 U. S. 388.

3. The court's jurisdiction under the Urgent Deficiencies Act to enjoin orders of the Commission bears a reciprocal relationship to its jurisdiction to enforce such orders, and the Commission's certificate, directed to the Secretary of the Treasury rather than to the carriers, and being, moreover, for the payment of money, clearly falls outside the enforcement side of the court's special jurisdiction over regulatory orders and therefore should be reciprocally excluded from the enjoining side of the jurisdiction.

The lack of relationship between action of the Commission taken under section 209, and regulatory action reviewable under the Urgent Deficiencies Act, is further demonstrated by the fact that a reciprocal relationship is held to exist between the court's jurisdiction to enjoin and its jurisdiction to enforce orders of the Commission.

In *Illinois Central R. R. Co.* v. *U. S.*, 244 U. S. 81, there was involved an order of the Commission assigning the case for hearing over the objections of the carrier that the Commission lacked jurisdiction of the subject matter. The court, in holding that the order was not reviewable, called attention to the fact that jurisdiction under the Urgent Deficiencies Act is two-sided, the Court having jurisdiction to enforce orders of the Commission on the one hand and having jurisdiction to set aside orders of the Commission on the other hand. Based on the reasoning in the *Procter & Gamble Case, supra,*

it was held that since attendance at a hearing is not the kind of thing that could be compelled, the order of the Commission assigning the case for hearing was not enforceable, and, since it was not enforceable against the carrier, reciprocally it was not enjoinable at the instance of the carrier. At pages 88, 89, the court in applying the principles of the *Procter & Gamble Case*, said:

> * * * Considering the first and second subdivisions of section 1, (section 207 of the Judicial Code,) which deals with the jurisdiction of the Commerce Court, it was said that the first " provides for the enforcement of orders, that is, the compelling of the doing or abstaining from doing of acts embraced by a previous affirmative command of the Commission;" and that the second, "dealing with the same subject from a reverse point of view, provides for the contingency of a complaint made to the court by one seeking to prevent the enforcement of orders of the Commission such as are contemplated by the first paragraph. In other words, by the cooperation of the two paragraphs, authority is given on the one hand, to enforce compliance with the orders of the Commission if lawful, and, on the other hand, power is conferred to stay the enforcement of an illegal order." Other provisions of the act were said to be as convincing.
>
> It will thus be observed, as said by counsel for the Commission, "The power of a court

> 'to stay the enforcement of an illegal order' is, in a sense, reciprocal to its power to enforce compliance with an order of the Commission, 'if lawful.' And just as the district court would have been powerless in the instant case, to compel the appellee to attend the hearing with respect to which the notice had been given, so also was it without lawful authority to annul that notice or to enjoin the Commission from proceeding in the premises." And again, as other counsel say, the alleged order was nothing more than notice of a hearing which the railroad company might attend or not, as it saw fit.

Under the Commerce Court and Urgent Deficiencies Acts the court's jurisdiction to enforce is confined to—

> All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture and penalty, or by infliction of criminal punishment of any order of the Interstate Commerce Commission other than for the payment of money.

The Commission's certificate herein involved, being for the payment of money, would appear to be expressly excluded from the enforcement side of the court's special jurisdiction. Moreover, although shippers may doubtless sue to enforce orders in which they are interested, it is apparent that in large part it is intended that suits shall be brought by the United States on behalf of the general public.

As evidencing this section 4 of the Commerce Court Act reads as follows:

> SEC. 4. That all cases and proceedings in the Commerce Court which but for this Act would be brought by or against the Interstate Commerce Commission shall be brought by or against the United States, and the United States may intervene in any case or proceeding in the Commerce Court whenever, though it has not been made a party, public interests are involved.

In this connection the historical reasons for excluding orders for the payment of money from the court's special jurisdiction are illuminating. When that jurisdiction was first created the only orders for the payment of money were for damages on account of violations of the Act. Clearly, the reasons for the United States taking the initiative in enforcing administrative orders of the Commission for the regulating of rates and services in the interest of the general public are not applicable to the Commission's order or award of damages, which is of interest, not to the general public, but only as between individual carriers and shippers. And, accordingly, the court's primary jurisdiction in respect of the purely legal question of damages is recognized and shippers are left to bring their own court actions wherein the Commission's award is of *prima facie* force only. Similarly, it would involve a strained construction to assume that the United States might take steps to enforce the Commission's certificate against the Secretary of the

Treasury, thereby aligning the public on the side of the carriers in the carrier's claim against the public's own funds and, accordingly, if the doctrine of reciprocity as between the enforcing and enjoining sides of the court's jurisdiction is to be observed, it would seem that the carrier may not resort to the Urgent Deficiencies Act to enjoin the Commission's certificate.

Appellant asserts that *Dayton Goose Creek Ry. v. United States*, 263 U. S. 456, involving the Commission's circular orders requiring reports pertaining to excess income susceptible to recapture, is a complete answer to the position that money orders are not subject to the injunctive side of the court's jurisdiction. But even disregarding the fact that the opinion in that case states at page 475 that the appellees were not relying upon the jurisdictional question but desired a decision on the merits, it will be seen that the order in respect whereof the court there assumed jurisdiction was not an order for the payment of money. It is true that the circulars, in addition to ordering that reports be made, contained an admonition to pay, the excess income shown, but that this was not regarded as a real requirement or order is shown by the fact that counsel for the Commission took the position (p. 465) that the orders were merely a procedural step and did not require the railroad to pay into a reserve fund or to the Commission any sum of money, and by Chief Justice Taft's statement in respect of this feature of the order. At page 475 he said:

> The Commission requested it to report what provision it had made for setting up a fund to preserve one-half of these excesses, and to remit the other half to the Commission.

If, then, the Commission's instructions to pay the excess shown were merely requests they could not have been orders, enforceable or entailing penalties, and since the decision should be interpreted consistently with other decisions of the court under the Urgent Deficiencies Act it follows that the court assumed jurisdiction solely on the basis that the only real requirement in the circulars was for reports pertaining to excess income. Furthermore the Transportation Act, while excluding the guaranty section, specifically made the recapture clause a part of the Interstate Commerce Act.

4. The fact that the guaranty section is in substance a gratuity and the fact that its terms, agreed to by the carriers, clothe the Commission with broad discretion in the premises without provision for appeal from its determination rebut any possible implication that the Government intended that the Urgent Deficiencies Act should constitute its consent to be sued in respect of the amount of its gift.

Payments made under section 209 of the Transportation Act should in no way be confused with the just compensation due the carriers for their taking and use during the war emergency period. Such compensation was provided for by the Federal Control Act, containing provisions for its determina-

tion, if not voluntarily agreed upon, by a board of referees with privilege of appeal to the Court of Claims. By reference to section 3 of the standard contract between appellant and the Director General (R. 46, 47), it will be seen that the appellant accepted the amounts named in the contract in full discharge for compensation on account of the taking and use of its properties. This Court has held, in a case involving grants to carriers under section 204 of the Transportation Act, above mentioned, that a similar waiver contained in the standard contract made with short-line carriers constituted a complete waiver of compensation other than that named in the contract. *St. Louis, Kennett & Southeastern R. R. Co.* v. *U. S.*, 267 U. S. 346. Congress did not therefore enact section 209 in recognition of any constitutional or legal obligation but solely as a manifestation of its desire to deal generously and in all fairness with the carriers. This section must, we think, be regarded as a gratuity in substance for, although the carrier agreed to pay to the United States sums earned in excess of the guaranty amount, it did not have to file acceptance until fifteen days following the commencement of the six-months guaranty period, at which time, in view of the approximately $12,000,000 deficit under the guaranty that was in fact sustained for that short period, it must have been readily forseeable that no excess over the guaranty payable to the Government would be earned. On the other hand,

if the offer made by the United States in this section and its acceptance by the carrier is regarded as effecting a contract supported by legal consideration consisting of the very remote possibility that earnings might be precipitately and unexpectedly enlarged during the six-month period to such extent that an excess payable to the Government would be shown, still the situation is not changed, for the terms of the guaranty, agreed to by both parties, clothe the Commission with broad discretion in the premises. The basic amount of the guaranty, it is true, is fixed by statute, in that it is that the carrier's net railway operating income for the guaranty period shall not be less than one-half its annual contract compensation for the control period, (Sec. 209(c) (1)) but the determination of the proper allowances in maintenance expenditures and other operating expenses in arriving at the amount by which the net income in fact earned during the guaranty period was less than the guaranteed net income is left to the administrative judgment of the Commission. For example, in respect of maintenance expenditures, the Act, while directing the Commission to follow, in so far as applicable, the carrier's federal control contract, nevertheless provides that the allowance shall not be more than the amount fixed by the Commission (Sec. 209(f)(3)) and in respect of other operating expenses and operating revenues it directs the Commission to require the elimination and restatement thereof to the extent necessary to correct and exclude any dis-

proportionate or unreasonable charge to expenses or revenues (Sec. 209 (f)(5)). The section contains no provision for appeal from or review of the Commission's determination.

In view of the rule that the United States may not be sued without its consent, the intent to consent that the amount of its gift should be subject to court review should not be read into the statutes; the most that can be said is that mandamus would lie against the Commission or the Secretary of the Treasury if they had refused to take action in respect of duties plainly imposed upon them by the Act, or if action taken was shown to be clearly capricious and arbitrary. *Work* v. *Rives,* 267 U. S. 175, 182.

II

THE GOVERNMENT'S CONSENT TO THIS SUIT CAN NOT BE FOUND IN ANY OTHER LEGISLATION PROVIDING FOR SUITS AGAINST THE UNITED STATES IN THE DISTRICT COURTS

Appellant's brief cites *O. R. & N. Co.* v. *Fairchild,* 224 U. S. 510, and *N. P. Ry.* v. *Department of Public Works,* 268 U. S. 399, as evidencing that, even if section 209 is not part of the Act to Regulate Commerce and the subject matter thereof is not commerce regulation, reviewable under the Urgent Deficiencies Act, the right to injunction nevertheless applies in a proper case to any unlawful order of the Commission.

As above stated, this suit does not belong to that class of suits which have been held not to be suits against the Government, although brought against

agencies or officials of the Government, and although the agency or official committing the wrong assumed to act on behalf of the Government. In the present suit the United States is named as defendant and the public moneys are involved. The suit is therefore against the United States, both in form and in substance.

While the *Tucker Act* authorized suits against the United States in the district courts, founded upon any law of Congress, or contracts, express or implied, such suits are limited by that Act to claims not exceeding $10,000 (36 Stat. 1093; Judicial Code, section 24(20)) and have been construed to be confined to actions wherein the relief prayed for is by way of money decree or judgment. *United States* v. *Jones,* 131 U. S. 1; *District of Columbia* v. *Barnes,* 197 U. S. 146, 152. The relief asked in this suit is not for a money decree but is in equity for an injunction against the Commission's certificate and against officials of the United States. Even if the prayer were for a money decree it is clear that the amount of the claim would greatly exceed $10,000.

We respectfully submit that the decree of the District Court should be affirmed.

DANIEL W. KNOWLTON,
For Interstate Commerce Commission.

P. J. FARRELL,
Of Counsel.

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